

***United States Court of Appeals
for the Second Circuit***



MEMORANDUM

77-4057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067,
77-4068, 77-4073,
77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents,

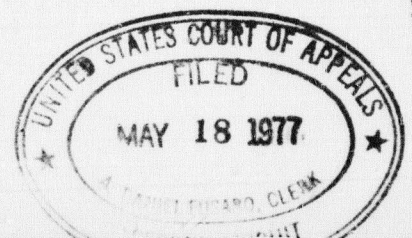
MCI TELECOMMUNICATIONS CORP., ET AL.,

Intervenors.

On Petition for Review of Orders of the
Federal Communications Commission

STATEMENT IN LIEU OF BRIEF OF
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

The administrative orders under review here are the
subject of six consolidated petitions for review, one of which
(No. 77-4057) was filed by American Telephone and Telegraph



Company ("AT&T"). The petitions raise numerous issues regarding the validity of various aspects of far-reaching prescriptions of telecommunications rates and practices by the Federal Communications Commission. AT&T has urged in its principal brief that the Commission's orders are contrary both to the requirements of the Communications Act and to the prior instructions of this Court. AT&T believes it appropriate, however, to submit the following statement to indicate to the Court its position regarding certain of the contentions advanced by other petitioners. The submission of such a statement of position now, rather than its inclusion in AT&T's reply brief,^{1/} will afford the other petitioners an opportunity in their reply briefs to make any response they believe appropriate.

AT&T will not burden the Court with a full statement of its views regarding all of the contentions advanced by all of the other petitioners. It suffices to state that AT&T does not necessarily share or accept all of the factual and legal claims made by those petitioners. It is important, however, to make clear that AT&T believes that the contentions advanced by petitioner International Business Machines Corporation ("IBM") are without foundation.

^{1/} AT&T expects to file a timely reply brief in which it will respond to any contentions advanced by the Commission or other parties regarding the issues dealt with in AT&T's principal brief.

IBM argues that the Commission erred in concluding that the proposed new "tier" of resellers of private line services will be common carriers, and in requiring those resellers to be regulated as carriers under some, but not all, of the provisions of Title II of the Act. IBM suggests that resellers will not be common carriers because, although they satisfy all of the other indicia of carriers under the Act, they will not themselves "transmit" communications by wire, but will instead rely on the first "tier" of carriers, such as AT&T, to perform the transmission function. In addition, IBM argues that, if resellers will be carriers within the meaning of the Act, the Commission should nonetheless have "forborne" from regulating them in accordance with the Act's requirements. Both contentions are mistaken.

First, IBM's definitional argument is inconsistent with the facts found by the Commission. The Commission concluded that many resellers will not act merely as brokers, as IBM evidently assumes, but instead will serve as "processors" which will themselves provide supplemental facilities or services. The Commission emphasized that it expects such resellers to retain "continuous control" over the utilization of facilities leased by them from AT&T and other carriers. (App. at 43.) The Commission found that resellers will be engaged in activities that are essentially "traditional communications common carriage." (Id. at 91.) In short, IBM's

definitional argument depends on a factual characterization of the activities of resellers that was rejected by the Commission.

Second, IBM's argument cannot stand scrutiny under the Act itself. The definition of "communication by wire" contained in Section 3(a) of the Act refers to "transmission," as IBM has observed, but that definition is substantially more comprehensive than IBM has suggested. In particular, the section expressly provides that such transmission

"includ[es] all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

Whatever might be the precise limits of that definition, it certainly is sufficiently broad to support the conclusion reached by the Commission here.^{2/} As described above, many of the proposed resellers are expected to provide their own supplemental "facilities" and "services," and all of them plainly will be engaged in the "receipt, forwarding, and delivery" of communications. (App. at 43.)^{3/}

^{2/} See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *United States v. Midwest Video Corp.*, 406 U.S. 649, 660-61 (1972); *General Telephone Co. of the Southwest v. United States*, 449 F.2d 846, 853 (5th Cir. 1971).

^{3/} It is significant that the term "transportation" in the Interstate Commerce Act, upon which the Communications Act was modeled, has been construed to include ancillary services, such as warehousing, that were not part of the carrier's common law duties, as well as services, such as unloading, that the shipper could perform for itself. *Railroad Board v. Duquesne*, 326 U.S. 446 (1946); *Cleveland & St. L. Ry. v. Dettlebach*, 239 U.S. 589 (1915); *Gillis v. ICC*, 227 U.S. 434 (1914). The term "communications" has been given at least as broad an interpretation for purposes of the Communications Act. *Western Union Telegraph Co.*, 11 F.C.C. 2d 1 (1969); *In re AT&T*, 10 F.C.C. 315 (1944).

Nor is there merit in IBM's claim that the Commission should have elected to "forbear" completely from regulating resellers in conformity with the requirements of Title II of the Act. In fact, the Commission has already forborne from regulation of the resale carriers to the extent it believed justified. The Commission has a degree of flexibility in devising regulatory mechanisms to achieve its statutory goals, but it is not entitled to ignore Congress' instruction that communications common carriage be regulated in the public interest.

Moreover, even if it were thought that the Commission might have authority to disregard Congress' commands, there is no occasion for the exercise of any such authority here. Although, as shown in AT&T's principal brief, the Commission did not pause to assess realistically the consequences of its far-reaching orders, it is at least clear that those orders will radically restructure the telecommunications industry. This will occur at least partly as a result of the new "tier" of resale carriers, which will be essentially engaged in traditional communications common carriage. (App. at 91.) In these circumstances, any effort by the Commission completely to exempt resellers from regulation as common carriers would have unjustifiably deprived the public of the protections afforded by Congress through the Act. Even apart from the Act's requirements, strong considerations of policy support the Commission's refusal to exclude resellers from Title II.

Finally, even if it were assumed that IBM might be correct in its claims, the Commission's orders clearly could not appropriately be set aside merely insofar as they require the regulation of resellers. The Commission's orders are an interrelated series of determinations that were evidently premised in significant part upon the Commission's expectations regarding the functions, characteristics and regulability of the new "tier" of resellers. If the Court were to accept IBM's contentions, those expectations would be markedly altered, and other aspects of the Commission's regulatory scheme for the rendition of private line services would be substantially affected. In such a situation, the orders clearly should be set aside in their entirety to permit the Commission to reexamine all of its determinations in light of the Court's instructions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles Lister, a member of the bar of this Court, hereby certify that a copy of the Statement in Lieu of Brief of American Telephone and Telegraph Company was served this 18th day of May, 1977, by United States mail, postage prepaid, to the parties listed on the attached.

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